Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MARY JANE WILSON,

Petitioner,

v.

THOMAS DAVID MARCHINGTON;
INLAND EMPIRE SHOWS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CAMERON FERGUSON
Counsel of Record
CHANNING J. HARTELIUS
HARTELIUS, FERGUSON, BAKER & KAZDA, P.C.
600 Central Avenue, Suite 408
P.O. Box 1629
Great Falls, MT 59403-1629
(406) 727-4020

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. If non-Indians have an interest in a highway on the reservation, should the tribal interest in protecting its members be sufficient to exercise civil jurisdiction?

2. Did the Blackfeet Tribal Court have jurisdiction over this case involving a motor vehicle collision which occurred on an Indian reservation between a tribal member and a non-tribal member?

3. Did the U.S. Court of Appeals for the Ninth Circuit err in applying the holding of *Strate v. A-1 Contractors*, based on presumptions that the facts of the two cases are similar?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mary Jane Wilson, respectfully prays for a Writ of Certiorari to review the opinion and judgement denying rehearing of the United States Court of Appeals for the Ninth Circuit. That Court's final order was entered on the 17th day of November, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, entered September 23rd, 1997, can be found in the Appendix (hereinafter "App.") hereto, pages App. 1 through App. 25. The Order deny rehearing can be found hereto at App. 26.

JURISDICTION

The Ninth Circuit Court of Appeals filed its opinion on the 23rd day of September, 1997. Petition for rehearing and suggestion for rehearing on banc was denied and rejected by order on the 19th day of November, 1997. This Petitioner for Writ of Certiorari is filed on the 17th day of February, 1998, within 90 days of the 19th day of November, 1997.

This Court has jurisdiction to review the final judgement of the Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

All of the Statutes listed below can be found in the Appendix.

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25 U.S.C. § 324

25 U.S.C. § 325

25 U.S.C. § 326

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1855 WL 5599 (Trty.)

STATEMENT OF THE CASE

A. Introduction

Petitioner Mary Jane Wilson (hereinafter "Mary Jane") is a member of the Blackfeet Indian Tribe residing on the Blackfeet Indian Reservation in Montana. Respondents Thomas Marchington and Inland Empire Shows (hereinafter "Marchington") are non-Indians. On July 17,

1989, Marchington, who was employed by Inland Empire Shows, was driving a semi-tractor trailer carrying a carnival ride through the Blackfeet Indian Reservation. Mary Jane was driving a car on the same highway ahead of Marchington. A few miles east of the town of Browning, within the reservation boundaries, Mary Jane made a left hand turn. Marchington crossed a double yellow line attempting to pass her, causing a collision which resulted in significant injuries to Mary Jane.

Throughout the proceedings, Respondents' have contended that the collision occurred on a U.S. Highway. However, there is no record upon which to base this opinion.

B. Proceedings in the Tribal Courts and in the Federal District Courts

The parties tried the case before a jury in the Blackfeet Tribal Court beginning on June 16, 1992. The jury entered judgment in favor of Mary Jane finding that Marchington was liable for causing the collision and awarded damages of $246,100.00. The judgment was affirmed by the Blackfeet Court of Appeals, the Blackfeet Supreme Court and the United States District Court for Montana, which had jurisdiction pursuant to 28 U.S.C. § 1331. Mary Jane sought registration of the Tribal Court judgment in the United States District Court, which the District Court granted.

C. Proceedings in the United States Court of Appeals for the Ninth Circuit

Marchington appealed the District Court decision to the Ninth Circuit Court of Appeals, which has jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit overturned the District Court decision on the 23rd day of September, 1997. Mary Jane then submitted a Petition for Rehearing with Suggestion for Rehearing En Banc. That Petition was denied on the 19th day of November, 1997.

REASONS FOR GRANTING THE WRIT

Petitioner requests a Writ of Certiorari because the United States Court of Appeals has decided an important question of federal law in a way that conflicts with other rulings made by this Court.

In its decision in this *Mary Jane Wilson* case, the Court of Appeals stated that it almost precisely mirrors the facts of *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404 (1997). (App. 21). In making this statement however, the Court overlooked certain important issues of fact and law.

The Court of Appeals held that, like *Strate v. A-1 Contractors*, there is no Tribal Court jurisdiction in this case. However, the case at bar differs from *Strate* in three distinct ways.

1. The land here is not alienated land and therefore neither *Strate v. A-1 Contractors* nor *Montana v. United States* should apply.

2. Should this Court find that the existence of a highway creates a non-Indian interest in the land, then under *Montana v. United States*, tribal interest should still grant jurisdiction to the tribe.

3. And finally, *Strate v. A-1 Contractors* cannot apply without a factual finding, and here, there is no record to support the findings of the Court of Appeals.

A. No alienation of land to allow application of *Montana v. United States*

In *Strate*, this Court relied upon the fact that the Indian tribes had voluntarily alienated tribal land by granting a right of way for construction of a state highway. This Court then considered the highway as alienated non-Indian land such that it could apply the Tribal Court jurisdiction principles of *Montana v. United States*, 450 U.S. 544 (1981).

Strate contained the following specific facts: (a) The Indian Tribes had made a specific grant of a right of way for construction of a particular highway pursuant to federal legislation enacted in 1948 (25 U.S.C. Sections 323-328); (b) the consent of proper tribal officials was obtained; and (c) the payment of just compensation to the tribe was made. In *Wilson*, the facts are markedly different: there is no tribal grant of any right-of-way, no specific consent of tribal officials for construction of the particular highway involved, and no compensation paid to the Blackfeet Tribe for any right-of-way.

Therefore, since the tribe did not alienate fee title to the land to non-Indians, the accident did not occur on

alienated fee title land, and the limiting Tribal Court jurisdictional principles of *Montana*, cited *supra*, do not apply. In its decision, the Court of Appeals stated that similar to the situation in *Strate*, the Blackfeet Tribe has consented to the right-of-way grant for the particular highway involved. However, the only support for this statement is the Court's reference to the Treaty of 1855 between the United States and the Blackfeet Nation. As the Court quotes, the treaty provides,

> For the purpose of establishing traveling thorough-fares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree and the United States may, within the countries respective occupied and claimed by them, construct roads of every description . . .

(App. 20).

The Treaty thus provides consent by the Blackfeet Tribe for the United States to construct roads. However nowhere in this language does the tribe alienate fee title to its land for construction of the roads. The Court of Appeals, without any statement of authority whatsoever, equated consent to construct roads with alienation of fee title. In *Strate*, the tribes involved had granted a specific right-of-way according to particular federal legislation and had received compensation therefore.

The Court of Appeals in *Mary Jane Wilson* noted that the public has unrestricted access to Highway 2, and gave this fact as support for the contention that the Highway is alienated non-Indian land. (App. 21) However, the fact that the public uses a road on an Indian reservation

cannot alter the character of ownership of the underlying land. Non-Indians should not have the power to take and convert title to Indian land simply by use. Such would be an outrageous assault on Indian sovereignty.

Because the Blackfeet Tribe retained the beneficial ownership of the land where Highway 2 is located (and there is no evidence to the contrary), the tribe retained all jurisdictional rights. See also the opinion of Justice Stephens in *Brendale v. Confederated Yakima Nation*, "the fact that nonmembers may now drive on these roads does not . . . undermine the Tribe's historic and consistent interest" in such lands. 492 U.S. 408, 439-440 (1989).

The fact that the tribe does not have the power to exclude non-Indians from the highway has no bearing on the civil jurisdictional power. This Court has affirmed a tribe's jurisdictional power over non-Indians even when it does not have the right to exclude them. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-148 (1982); *Brendale*, cited *supra*, 492 U.S. at 425 (opinion of Justice White).

The Court of Appeals in *Mary Jane Wilson*, stated that like the highway involved in *Strate*, Highway 2 is a state highway constructed on a right-of-way granted pursuant to a federal statute. The Court refers to a federal statute which authorizes the Secretary of the Interior to grant permission to a State to construct highways on an Indian reservation. (App. 20). However, the Court of Appeals overlooked the fact that the Blackfeet Tribe did not grant any right-of-way.

The federal government can only grant to a state whatever interest in Indian land it already possessed through treaty rights or specified grants by the tribe involved (such as in *Strate* where the tribes made a specific grant of a particular right-of-way). In this case the federal government only had the right to construct roads to the extent allowed under the Treaty of 1855. Therefore, all that the federal government could transfer to the State of Montana was the right to construct roads. Since the tribe did not alienate the title to any land in the Treaty, the transfer of the right to construct roads from the federal government to the State of Montana could not possible operate as an alienation of title by the tribe.

The Court of Appeals noted that it found no statute or treaty authorizing the Blackfeet Tribe to govern the conduct of nonmembers on the highway. (App. 21) However, in this argument, that Court overlooked the essential fact that Indian tribes retain all civil jurisdiction which they have not surrendered by treaty or by specific tribal government acts as authorized by federal law. The United States Supreme Court in *Montana* recognized that Indian tribes have power to exercise civil jurisdiction over non-Indians except as limited by federal law. Tribes do not need to prove the existence of such jurisdiction by statute or treaty. Rather any party seeking to limit such jurisdiction has the burden to show surrender.

In the Treaty of 1855, the Blackfeet Tribe only allowed the federal government to construct roads on the reservation. They did not alienate title to tribal land. Therefore, the burden is not on the tribe to show by statute or treaty that they retained rights to the title to such land. They

have full rights of ownership unless the federal government can show otherwise. Inherent tribal sovereignty does not depend on a delegation of federal power. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Therefore as noted, the burden is on the party challenging tribal sovereignty to show that Congress has expressly divested it. See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

For example, in *Buttz v. Northern Pac. RR. Co.*, 119 U.S. 55, 68 (1886), Congress first "obtain[ed] from the Indians the right to construct railroads . . . across their lands . . . and afterwards . . . obtain[ed] a cession of their entire title" to the same lands. The cessation of title was obtained upon specific agreement of the tribe and payment of certain money consideration. Thus, there are two separate matters, the right to construct a transportation line and the extinguishment of title. The distinction is made largely because of the different jurisdictional consequences that attach to each such matter.

Whether the limiting jurisdictional principles of *Montana* apply only depends upon the character of the land. Unless the Respondents can show that the Blackfeet Tribe have alienated title to the highway land (which they have not), they should not prevail. Whether the tribe has power to prosecute non-Indians for driving infractions committed on such highway is irrelevant. Again, it is the character of the land that matters under *Montana*.

The Court of Appeals also noted that Montana maintains Highway 2. Once again, such a fact does not change the character of the land. A state can only acquire

jurisdiction over Indians in a specified manner (25 U.S.C. §§ 1321-1326). Constructing and maintaining a highway is not a specified manner.

B. Unlike the case at bar, no tribal member was involved in *Strate v. A-1 Contractors.*

Should this Court find that there is a non-Indian interest in the land at issue here, then the tribe should still have jurisdiction because one of the parties is a tribal member, and therefore, the exception for the health and welfare of the tribe, as laid out in *Montana*, should apply.

In *Strate* neither party involved in the motor vehicle collision was a tribal member. This Court stated, "This dispute," as the Court of Appeals said, is "distinctly non-tribal in nature." 76 F.3d, at 940. It "arose between two non-Indians involved in [a] run-of-the-mill [highway accident]." 117 S.Ct. 1415 (1997).

Here the Petitioner is a tribal member. Even if the limiting Tribal Court jurisdictional principles of *Montana* were to apply, Petitioner's status as a tribal member should control. Mary Jane's status brings her within the second exception of the *Montana* test, which provides for jurisdiction where the tribal welfare has been directly effected. 450 U.S. 544 (1981). The Court of Appeals contended that the second *Montana* exception did not apply because an injury to a single tribal member cannot effect the political integrity, economic security, health or welfare of the tribe. (App. 23).

Mary Jane's argument was well phrased by United States District Court Judge Donald W. Molloy in the recent case of *State of Montana v. Bremner*. As Judge Molloy explained:

> The plaintiffs argue that the second *Montana* exception applies only to conduct which affects the tribe as a whole rather than an individual member of the tribe. This reasoning is flawed because it inevitably leads to an intractable question: How many tribal members must be injured or killed before a defendant's conduct rises to a level that affects the health and welfare of the tribe? A family? A car full? A community? Answering this question on a case by case basis, takes into account geography as well as tribal membership and other explorations for exceptions leads only to confusion and faulty thinking.
>
> In my view, injury to a single tribal member is sufficient to implicate the interests protected by the second *Montana* exception. That exception protects not only a tribe's interest in its health and welfare, but its interests in self-government and political integrity as well. See *Strate*, 117 S. Ct. at 1415. The right of a political community to govern disputes which involve its members is an important part of self-government. See, e.g. 25 U.S.C. § 450 (a) (Indian Self-Determination and Education Assistance Act) "The Congress . . . finds that . . . the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons."

United States District Court for Montana, Great Falls Division, cause CV 97-59-GF-DWM filed July 31, 1997.

C. Value of a remand to the Tribal Court

This Court has emphasized the importance of obtaining Tribal Court expertise and insight into questions of tribal jurisdiction. *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845, 857 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987). In the case at bar, the Tribal Court has not had the opportunity to consider the jurisdictional issues raised by this Court in *Strate*.

The Ninth Circuit Court thus construed the provisions of the Blackfeet Treaty of 1855 without the expertise and insight of the Blackfeet Tribal Court regarding their own treaty. The Court of Appeals overlooked the importance of obtaining such expertise and insight which could only be obtained through a remand to the Tribal Court for such purpose. Indeed, the proper construction of a tribe's own treaty should be considered essential for purposes of considering the tribe's rights thereunder. If the tribe did not alienate title to land under such Treaty, then by virtue of its decision in *Mary Jane Wilson*, the Court of Appeals is in effect appropriating tribal land.

In its decision, the Court of Appeals referred to the State of Montana's right-of-way for Highway 2. (App. 21). In making this reference, the Court overlooked two facts: there was no finding of fact to support this assertion and there was no right-of-way. The opinion points to no instrument creating a right-of-way, including any

right-of-way which could have extended to the sides of the highway. There is absolutely no evidence regarding the existence of any right-of-way. Once again, the most that can be said is that the Blackfeet Tribe consented to the construction of roads by the federal government. The federal government could only convey to the State of Montana whatever rights it had. Since it did not have any right-of-way, other than the right to construct roads, it could not transfer any right-of-way to the State of Montana. There is no agreement by counsel for Mary Jane that any right-of-way exists at all. Therefore any issue of how wide the right-of-way might be is totally irrelevant.

The Court of Appeals referred to descriptions of the collision in the decisions of the Blackfeet Supreme Court and the United States District Court. (App. 21, 22) At the time those Courts issued their respective decisions, the question regarding location of the collision on the reservation was not at issue. Indeed, until *Strate*, geography and the manner of creation of roads was not relevant.

CONCLUSION

This Writ of Certiorari is necessary because the United States Court of Appeals has decided an important question of federal law in a way that conflicts with other rulings made by this Court. Such consideration would secure and maintain uniformity of this Courts' decisions.

In *Strate,* a case involving no tribal members, this Court found that the tribes had specifically alienated interest in certain land. In *Mary Jane Wilson,* the Court of Appeals extended that ruling to provide that tribal courts have no civil jurisdiction over accidents occurring *on any state highway* (regardless of how the state may have acquired the right to construct the highway) and that such lack of jurisdiction applies even if one of the parties in the accident *is* a tribal member.

Except presumably for collisions which occur on back country tribal roads, the Court of Appeals has thus declared that Tribal Courts have no jurisdiction over non-Indian defendants even when a tribal member is injured in the accident. This is a very significant limitation of Tribal Court jurisdiction and presents a question of exceptional importance for tribes all across the country.

Petitioner contends that the Court of Appeals has overlooked various principles of fact and law, namely that there is no basis in the record to find that the Blackfeet Tribe alienated the land where the collision occurred. Simply stated, consent to allow the construction of roads does not equate to alienation of land ownership.

In *Mary Jane Wilson,* the Court of Appeals has effectively overruled its prior decision of *Hinshaw v. Mahler* which found the existence of tribal court jurisdiction in automobile accidents. (App. 24) citing 42 F.3d 1178 (9th Cir. 1994)). The Court of Appeals has further declined to

follow a long history of its decisions supporting tribal court jurisdiction over non-members.[1]

Respectfully submitted,

CAMERON FERGUSON
Counsel of Record
HARTELIUS, FERGUSON, BAKER & KAZDA, P.C.
600 Central Plaza, Suite 408
P. O. Box 1629
Great Falls, MT 59403-1629
Telephone: (406) 727-4020
Attorneys for the Petitioner

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[1] *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994); *United States v. Plain Bull*, 957 F.2d 724 (9th Cir. 1992); *Crawford v. Genuine Parts*, 947 F.2d 1405 (9th Cir. 1991); *Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991); *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074 (9th Cir. 1990); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221 (9th Cir. 1989); *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988); *White Mountain Apache Tribe v. Smith Plumbing, Inc.*, 856 F.2d 1301 (9th Cir. 1988); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987); *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 18 (1987); *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983); and *Babbitt Ford, Inc., Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983).

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY JANE WILSON, *Plaintiff-Appellee,* v. THOMAS DAVID MARCHINGTON; INLAND EMPIRE SHOWS, INC., *Defendants-Appellants.*	No. 96-35145 D.C. No. CV-92-00127-PGH OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
July 22, 1997 – Seattle, Washington

Filed September 23, 1997

Before: Eugene A. Wright, Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

COUNSEL

William O. Bronson, James, Gray, Bronson & Swanberg, Great Falls, Montana, for defendants-appellants.

Channing J. Hartelius and Cameron Ferguson, Hartelius, Ferguson, Baker & Kazda, Great Falls, Montana, for plaintiff-appellee.

Jeanne S. Whiteing, Whiteing & Smith, Boulder, Colorado and Donald G. Kittson, Browning, Montana, for *amicus curiae*, Blackfeet Tribe.

George C. Dalthorp and Michael E. Webster, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Montana, for *amicus curiae*, National Association of Independent Insurers.

Paul R. Haffeman, Davis, Hatley, Haffeman & Tighe, Great Falls, Montana, for *amicus curiae*, Glacier Electric Cooperative, Inc.

Harley R. Harris, Office of Attorney General, Helena, Montana, for *amicus curiae*, State of Montana.

K. Jerome Gottschalk, Native American Rights Fund, Boulder, Colorado, for *amicus curiae*, The Three Affiliated Tribes of the Fort Berthold Reservation, and the Chippewa Cree Tribe of the Rocky Boy's Reservation.

Charles G. Cole, Steptoe & Johnson, Washington, District of Columbia, for *amicus curiae*, Burlington Northern Railroad Co.

Steven J. Lechner, Denver, Colorado, for *amicus curiae*, Mountain States Legal Foundation.

Lana E. Marcussen, Albuquerque, New Mexico, for *amicus curiae*, The Bighorn Livestock Association.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether, and under what circumstances, a tribal court tort judgment is

entitled to recognition in the United States Courts. We conclude that the principles of comity, not full faith and credit, govern whether a district court should recognize and enforce a tribal court judgment. In this instance, because the tribal court lacked jurisdiction, its judgment is not entitled to recognition in the United States courts.

I

The traffic accident which precipitated this action involved Mary Jane Wilson, who is an enrolled member of the Blackfeet Indian Tribe, and Thomas Marchington, who is not. On July 17, 1989, Marchington was driving on U.S. Highway 2 within the boundaries of the Blackfeet Indian Reservation in Montana on assignment for his employer Inland Empire Shows, an Idaho carnival company. Wilson, driving ahead of Marchington on the two-lane road, signalled a left turn. Marchington, in ignorance or in disregard of Wilson's intent, attempted to pass her on the left, careening into her car as she exited Highway 2.

Wilson sued Marchington and Inland Empire in the Blackfeet Tribal Court. The tribal jury found in favor of Wilson and awarded her $246,100. The Blackfeet Court of Appeals reversed for a hearing on whether punitive damages had been improperly awarded, but the Blackfeet Supreme Court reversed the Blackfeet Court of Appeals and reinstated the original judgment in favor of Wilson.

Claiming her judgment was entitled to full faith and credit or comity, Wilson brought suit in the United States District Court for the District of Montana to register the tribal court judgment in the federal court system. The

district court granted summary judgment in favor of Wilson.

II

No legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. Because states and Indian tribes coexist as sovereign governments, they have no direct power to enforce their judgments in each other's jurisdictions. By contrast, the United States Constitution and implementing legislation require full faith and credit be given to judgments of sister states, territories, and possessions of the United States. U.S. Const. art. IV, § 1, cl. 1; 28 U.S.C. § 1738. The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by "the comity of nations." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

Determining comity to be a proper basis for recognizing a tribal court judgment is not a remarkable notion; indeed, both parties agree that it is appropriate. However, Wilson asserts comity only as an alternative analysis, contending that a tribal judgment must be recognized by the United States under 28 U.S.C. § 1738, the implementing legislation of the United States Constitution's Full Faith and Credit Clause.

The Constitution's Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in

> which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

By its terms, the Full Faith and Credit Clause applies only to the states. Nothing in debates of the Constitutional Convention concerning the clause indicates the framers thought the clause would apply to Indian tribes. The Constitution is silent about recognition of tribal judgments, though it specifically addresses other tribal concerns. *See* U.S. Const. art. I, § 2, cl. 3 (excluding non-taxed Indians from the calculation of representative apportionment); art. I, § 8, cl. 3 (providing Congress the power to regulate commerce with the Indian tribes); amend. XIV, § 2 (excluding non-taxed Indians from the calculation of representative apportionment).[1] Thus, the Constitution itself does not afford full faith and credit to Indian tribal judgments.

Initial legislation implementing the full faith and credit clause was passed in 1790. The statute was modified in 1804 to include the extension of full faith and credit to United States territories and possessions. Subsequent technical amendments were made and the current full faith and credit statute reads in relevant part:

> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within

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[1] Additionally, as a matter of constitutional philosophy, it may not make sense to extend the constitutional mandate of full faith and credit "to a legal system largely outside the purview of the Constitution." Note, *Recognition of Tribal Decisions in State Courts*, 37 Stan. L.Rev. 1397, 1414 (1985).

> the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

Because Indian nations are not referenced in the statute, the question is whether tribes are "territories or possessions" of the United States under the statute. The United States Supreme Court has not ruled on the precise issue and its pronouncements on collateral matters are inconclusive. For example, in *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103-04 (1855), the Court held the Cherokee nation was a territory as that term was used in a federal letters of administration statute. By contrast, in *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909), the Court cited with approval *Ex Parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883) in which the district court held that the Cherokee nation was not a "territory" under the federal extradition statute. State courts have reached varied results, citing either *Mackey* or *Morgan* as authority, depending on the outcome.[2]

In our view, the decisive factor in determining Congress's intent was the enactment of subsequent statutes which expressly extended full faith and credit to certain

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[2] *Compare Jim v. CIT Fin. Servs.*, 533 P.2d 751 (N.M. 1975) (citing Mackey and holding that tribes are entitled to full faith and credit) and *In re Buehl*, 555 P.2d 1334 (Wash. 1976) (citing *CIT* and concluding that tribes are entitled to full faith and credit) with *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689 (Ariz. Ct. App. 1977) (citing *Morgan* and holding that an Indian reservation is not a territory for purposes of full faith and credit).

tribal proceedings: the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1983) (extending full faith and credit for certain actions involving trust, restricted or controlled lands), the Maine Indian Claims Settlement Act, 25 U.S.C. § 1725(g) (1980) (requiring the Passamaquoddy Tribe, the Penobscot Nation and the State of Maine to "give full faith and credit to the judicial proceedings of each other"), and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (extending full faith and credit to tribal custody proceedings). The Indian Child Welfare Act provides in relevant part:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Id. § 1911(d).

A later legislative act can be regarded as a legislative interpretation of an earlier act and "is therefore entitled to great weight in resolving any ambiguities and doubts." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (quoting United *States v. Stewart*, 311 U.S. 60, 64-65 (1940)). If full faith and credit had already been extended to Indian tribes, enactment of the Indian Land Consolidation Act, the Maine Indian Claims Settlement Act, and the Indian Child Welfare Act would not have been necessary. Further, the separate listing of territories, possessions and Indian tribes in the Indian Child Welfare Act provides an

indication that Congress did not view these terms as synonymous. Thus, we conclude that Congress did not extend full faith and credit to the tribes under 28 U.S.C. § 1738.

Further, if Congress had specifically intended to include Indian tribes under the umbrella of 28 U.S.C. § 1738, it could have easily done so either by specifically referencing them in the 1804 amendments, or by further amending the statute once ambiguous judicial constructions appeared. It chose not to, but rather elected to create a special exception in cases of Indian child custody determinations and land trusts.

Given this history, it would be imprudent of us to now construe the phrase "territories and possessions" in the 1804 statute to assume the meaning of the language Congress used in the Indian Child Welfare Act ("every territory or possession of the United States, *and every Indian tribe*") (emphasis added) and Indian Land Consolidation Act.

Certainly, there are policy reasons which could support an extension of full faith and credit to Indian tribes. Those decisions, however, are within the province of Congress or the states,[3] not this Court. Full faith and

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[3] *See, e.g.*, Okla. Stat. tit. 12, § 728 (permitting the Supreme Court of the State of Oklahoma to extend full faith and credit to tribal court judgments); Wis. Stat. § 806.245 (granting full faith and credit to judgments of Wisconsin Indian tribal courts); Wyo. Stat. Ann. § 5-1-111 (granting full faith and credit to judicial decisions of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation). Montana has judicially refused to extend full faith and credit to tribal orders, judgments and decrees. *In re Day*, 900 P.2d 296, 301 (1995).

credit is not extended to tribal judgments by the Constitution or Congressional act, and we decline to extend it judicially.

III

In absence of a Congressional extension of full faith and credit, the recognition and enforcement of tribal judgments in federal court must inevitably rest on the principles of comity. Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). As a general policy, "[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971). At its core, comity involves a balancing of interests. "[I]t is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton*, 159 U.S. at 164. Although the status of Indian tribes as "dependent domestic nations" presents some unique circumstances, comity still affords the best general analytical framework for recognizing tribal judgments.

As we recognized in Her Majesty the *Queen v. Gilbertson*, 597 F.2d 1161, 1163 n.4 (9th Cir. 1979), *Hilton*

provides the guiding principles of comity.[4] More recently, the Restatement (Third) of Foreign Relations Law of the United States (1986) [hereinafter Restatement (Third)] suggested two mandatory and six discretionary grounds for non-recognition of foreign judgments.[5] While *Hilton*

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[4] [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Hilton, 159 U.S. at 202-03.

[5] The Restatement (Third) § 482 provides:

(1) A court in the United States may not recognize a judgment of the court of a foreign state if:

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

and the Restatement (Third) provide sound guidance for assessing legal judgments of other nations, special considerations arising out of existing Indian law merit some modification in the application of comity to tribal judgments. In synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments. However, federal courts must neither recognize nor enforce tribal judgments if:

(1) the tribal court did not have both personal and subject matter jurisdiction; or

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(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign country was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

(2) the defendant was not afforded due process of law.

In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:

(1) the judgment was obtained by fraud;

(2) the judgment conflicts with another final judgment that is entitled to recognition;

(3) the judgment is inconsistent with the parties' contractual choice of forum; or

(4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.

The lack of personal jurisdiction mandates rejection of a foreign judgment under the Restatement (Third) and that requirement must logically extend to tribal judgments. Although the Restatement (Third) lists subject matter jurisdiction as a discretionary inquiry, the existence of subject matter jurisdiction is a threshold inquiry in virtually every federal examination of a tribal judgment. *E.g., Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 1411, 137 L. Ed. 2d 661 (1997); *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Additionally, the existence of subject matter jurisdiction is mandatory under the Uniform Foreign Money-Judgments Recognition Act which has been adopted by twenty-five states, including Montana. Louise E. Teitz, Transnational Litigation 253 & n.5 (1996); Mont.Code Ann. § 25-9-601 *et seq.* Accordingly,

the existence of both personal and subject matter jurisdiction is a necessary predicate for federal court recognition and enforcement of a tribal judgment.

A federal court must also reject a tribal judgment if the defendant was not afforded due process of law. "It has long been the law of the United State that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process." *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 519, 133 L. Ed. 2d 427 (1995). The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes.

Due process, as that term is employed in comity, encompasses most of the *Hilton* factors, namely that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. Further, as the Restatement (Third) noted, evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition." Restatement (Third) § 482 cmt. b.

Comity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. "Foreign-law notions are not per se disharmonious with due process by reason of their divergence from the common-law notions of procedure." Panama Processes, *S.A. v. Cities Serv. Co.*, 796 P.2d 276, 286 n.36 (Okla. 1990). Indeed, *Hilton* rejected challenges to a judgment based on lack of adequate cross-examination and unsworn testimony. 159 U.S. at 205. Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance. However, the tribal court proceedings must afford the defendant the basic tenets of due process or the judgment will not be recognized by the United States.

Marchington urges us to require reciprocal recognition of judgments as an additional mandatory prerequisite. In *Hilton*, the Supreme Court determined that a judgment from a foreign country would not be enforced by the United States courts if the foreign country would not enforce a similar American judgment in its courts. 159 U.S. at 210. However, the reciprocity requirement has fallen into disfavor. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court stated, "[a]lthough *Hilton v. Guyot* . . . contains some broad language about the relationship of reciprocity to comity, the case in fact imposed a requirement of reciprocity only in regard to conclusiveness of judgments, and even then only in limited circumstances." *Id.* at 411. According to the Restatement (Second) of Conflict of Laws (1988)

[hereinafter Restatement (Second)], "[e]xcept when otherwise required by local statute, the great majority of State and federal courts have extended recognition to judgments of foreign nations without regard to any question of reciprocity." § 98 cmt. f. The Restatement (Second) addresses the *Hilton* problem by noting that the decision involved "one isolated situation," and suggesting that *Hilton* be limited to its facts. *Id.* Additionally, Judge Learned Hand has observed that the Supreme Court "certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here. That doctrine I am happy to say is not a part of American jurisprudence." *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 300 F. 741, 747 (S.D.N.Y. 1924), *aff'd*, 267 U.S. 22 (1925); *see Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 460 (2d Cir. 1985).

Although courts have expressed disaffection for the reciprocity requirement, they have not entirely disavowed it. For example, in *Gilbertson*, we recognized that "the reciprocity requirement has fallen into some disfavor," 597 F.2d at 1164 n.6, and agreed that "reciprocity may no longer be a requirement," *id.* at 1165-66. However, we also noted that reciprocity "certainly remains a factor which may be considered in deciding whether to recognize a foreign country's judgment for taxes." *Id.* at 1166.

The general rationale underlying rejection of the reciprocity requirement is that it is a matter of diplomacy, best negotiated by the executive and legislative branches.

There are, of course, substantive differences between foreign relations with other nations and domestic relations with Native American tribes. Further, a policy of requiring reciprocity with foreign nations has practical limits which would not affect a domestic analysis. If a litigant sought recognition of a Djibouti judgment in Montana, for example, it is unlikely that Djibouti would have had the prior opportunity to consider recognition of a Montana judgment.

Despite these dissimilarities, the theory that the imposition of a reciprocity requirement is not a matter for courts to decide independently is generally sound. The question of whether a reciprocity requirement ought to be imposed on an Indian tribe before its judgments may be recognized is essentially a public policy question best left to the executive and legislative branches. The fact that some states have chosen to impose such a condition by statute reinforces this conclusion,[6] as does the judicial

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[6] *See, e.g.*, S.D. Codified Laws § 1-1-25(2)(b) (permitting South Dakota courts to recognize a tribal judgment if the courts of that tribe recognize the orders and judgments of the South Dakota courts); Okla. Stat. tit. 12, § 728(B) (allowing the Supreme Court of Oklahoma to recognize tribal court judgments where the tribal courts agree to grant reciprocity of judgments); Wis. Stat. § 806.245(1)(e) (granting full faith and credit to judgments of Wisconsin Indian tribal court judgments if, *inter alia*, the tribe grants full faith and credit to the judgments of Wisconsin courts); Wyo. Stat. Ann. § 5-1-111(a)(iv) (granting full faith and credit to the Eastern Shoshone and Northern Arapaho Tribes if, *inter alia*, the tribal court certifies that it grants full faith and credit to the orders and judgments of Wyoming).

response of looking to applicable statutes to decide reciprocity issues. *See, e.g., Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1003-04 (5th Cir. 1990) (examining the Texas Recognition Act to determine if an Abu Dahbi judgment should be enforced).

Neither the State of Montana nor, more relevantly, Congress has spoken on this question and we do not believe that *Hilton* or any controlling case law concerning recognition of foreign judgments requires a district court to reject a tribal judgment for lack of reciprocity. Thus, we decline Marchington's suggestion to adopt reciprocity as a judicially-created mandatory requirement.[7]

Lack of tribal jurisdiction and absence of due process, then, are the only mandatory reasons for a district court to reject a tribal judgment. The court may, in the exercise of its discretion, choose not to honor a tribal judgment for one of the other enumerated reasons. This approach satisfies two competing concerns: it provides tribes with a mechanism by which the judgments of their courts may be recognized by the United States while assuring defendants of due process of law and other safeguards inherent in our judicial system.

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[7] Whether a district court may, in the exercise of its discretion, reject a judgment for lack of reciprocity is a question we leave for another day. Although best left to our sister branches of government, there may be an appropriate case in which the record demonstrates significant public policy factors which might be sufficient for the district court to consider reciprocity under the "public policy" discretionary exception. Thus, we decline to endorse or preclude its discretionary consideration in a proper case.

IV

We reject the assertions of Marchington and several Amicus Curiae that the recognition of tribal judgments requires the application of state, rather than federal, law. We apply federal common law when a federal rule of decision is "necessary to protect uniquely federal interests." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an "intricate web of judicially made Indian law." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). State law, especially the compacts between a state and a tribe, may be of substantial significance in a particular case. However, the quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law. *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989); *see also In re Greene*, 980 F.2d 590, 595 (9th Cir. 1992) ("[T]he [district] court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law.").

V

Applying the comity analysis to this case, we find that the tribal judgment is not entitled to recognition or enforcement because the tribal court lacked subject matter jurisdiction, one of the mandatory reasons for refusing to recognize a tribal court judgment. Our jurisdictional

determination is commanded by *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997), decided April 28, 1997.

The Supreme Court's holding in *Strate* is succinctly stated in its opening paragraphs: "[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." *Id.* at ___, 117 S. Ct. at 1408.

The Supreme Court analyzed the North Dakota highway at issue in *Strate*, and concluded that "[t]he right-of-way North Dakota acquired for the State's highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at ___, 117 S. Ct. at 1413 (footnote omitted). To arrive at this conclusion, the Supreme Court made the following observations about the highway right-of-way: (1) the right-of-way was obtained pursuant to congressional legislation; (2) the grant of the right-of-way was acquired with the consent of the Indian tribe; (3) the right-of-way is open to the public; and (4) the right-of-way is controlled and maintained by the State. *Id.* at ___, 117 S. Ct. at 1414.

U.S. Highway 2, the road at issue in this appeal, is similar in all relevant respects to the highway in *Strate*. It is located on a right-of-way granted to the State of Montana under Section 4 of the Act of March 3, 1901, ch. 832, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 311). Under the section, the Secretary of the Interior is authorized

> to grant permission . . . to the proper State or local authorities for the opening and establishment of public highways in accordance with the laws of the State or territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under laws or treaties but which have not been conveyed to the allottees with full power of alienation.

See also Act of March 4, 1915, ch. 161, § 2, 38 Stat. 1188 ("That the legal authorities charged with the duty of laying out and opening public roads and highways under the laws of the State of Montana, having jurisdiction over any territory embraced within any Indian reservation in Montana, are hereby authorized and empowered to lay out and open public roads within any of the said Indian reservations. . . . "). Therefore, like the highway at issue in *Strate*, Highway 2 is a state highway constructed on a right-of-way granted pursuant to a federal statute.

Also similar to the situation in *Strate*, the tribe had consented to the right-of-way grant. Under the Treaty of 1855 with the Blackfeet Nation, the tribe agreed:

> For the purpose of establishing travelling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree and the United States may, within the countries respective occupied and claimed by them, construct roads of every description. . . .

Treaty with the Blackfeet Nation, October 17, 1855, U.S.-Blackfeet Nation, art. 8, 11 Stat. 867.

Finally, also as in *Strate*, the district court found, and no party or Amici denies, that the public has unrestricted access to Highway 2.

Thus, this case mirrors the facts of *Strate* almost precisely: it was an automobile accident between two individuals on a United States highway designed, built, and maintained by the State of Montana, with no statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway. The tribe had consented to construction of the road to which the general public had unrestricted access.

The question of whether the accident occurred on, or just off, Highway 2 is disputed by the parties. The district court, however, determined that the accident occurred on Highway 2, and we review this finding only for clear error. *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir. 1994) (en banc). There are facts in the record which support the district court's conclusion. The accident occurred while Marchington was trying to pass Wilson who, presumably unknown to Marchington, was turning left. Wilson's car apparently was struck in the side. Wilson argues the impact may have occurred just off Highway 2 because the truck was trying to avoid Wilson by driving on the left. However, both parties agreed that the State of Montana's right-of-way did not end at the pavement and could have extended up to fifty feet from the center line. We also note that the description of the accident by the Blackfeet Supreme Court would seem to support the inference that

the accident occurred on Highway 2.[8] Given these facts, there was no clear error in the district court's determination.

In *Strate*, the Supreme Court noted that even when the accident occurs on alienated land, a tort action may be brought in tribal court if one of the two following exceptions outlined in *Montana v. United States*, 450 U.S. 544 (1981), is met: (1) regulation of consensual relationships and (2) regulation of conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. The Supreme Court concluded in *Strate*, however, that a car accident on a public highway does not meet either *Montana* exception. *Strate*, ___ U.S. at ___, 117 S. Ct. at 1415, 1416.

Wilson and several Amici claim that a traffic accident injuring a tribal member sufficiently affects the economic security, political integrity, or health and welfare of the tribe, thus satisfying the second *Montana* exception. However, in *Strate*, this notion was rejected by Justice Ginsburg, speaking for the Court, who observed that:

> Undoubtedly, those who drive carelessly on a public highway running through a reservation

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[8] The Blackfeet Supreme Court provides the following account of the accident: "As plaintiff began her turn off of Highway # 2 onto the Whitford access road defendants' semi-truck crossed over a solid double yellow line running down the center of the highway and struck the left side of plaintiff's vehicle causing injuries to her neck and back."

> endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule.

Id., at ___, 117 S. Ct. at 1415. If the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*, then, perforce, Wilson's status as a tribal member alone cannot.[9] To invoke the second *Montana* exception, the impact must be "demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe." *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989). It is difficult to argue that these important interests will be diminished, much less jeopardized, if Wilson must present her individual tort claims in state or federal court, where she has plain, speedy, and adequate remedies.[10] As Justice

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[9] We rejected a similar *Montana* contention in *Yellowstone County v. Pease*, 96 F.3d 1169, 1170-71 (9th Cir.1996) (holding that the Crow tribal court did not have jurisdiction to enjoin enforcement of a tax because a dispute involving one particular property owned by a tribal member was insufficient to invoke the second *Montana* exception).

[10] This is not only true as a general proposition, but equitable tolling would prevent the assertion of a statute of limitations defense against Wilson based on the passage of time litigating in tribal and federal court if Wilson elects to refile her complaint in state or federal court following remand. *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 863 (9th Cir.1995) (equitable tolling in federal court); *Chance v. Harrison*, 899 P.2d 537, 539 (Mont. 1995) (equitable tolling in Montana state courts); *see also Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1950) (holding that equitable tolling would apply to an FELA claim timely filed in the wrong venue).

Ginsburg observed, "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them. . . . Opening the Tribal Court for [the plaintiff's] optional use is not necessary to protect tribal self government [.]" *Strate*, ___ U.S. at ___, 117 S. Ct. at 1416 (internal quotation omitted). Thus, although the parameters of the *Strate* holding are not fully defined, its application to the specific circumstances of this case precludes tribal court jurisdiction.

Finally, the Blackfeet Tribe (as Amicus Curiae), contends that *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), which found tribal jurisdiction in an automobile accident, controls. However, *Hinshaw* has been effectively overruled by *Strate* for its general propositions concerning tribal jurisdiction and is no longer viable law on those issues.

VI

The principles of comity require that a tribal court have competent jurisdiction before its judgment will be recognized by the United States courts. Because the tribal court did not have subject matter jurisdiction over Marchington or Inland Empire Shows, Inc., Wilson's judgment may neither be recognized nor enforced in the United States courts. The district court foresaw this very result, but constrained by *Hinshaw*, entered summary judgment in favor of Wilson. Ironically, although the district court was correct and even prescient on all substantive matters, we must reverse its judgment in favor of Wilson and remand with instructions to enter judgment

in favor of Marchington and Inland Empire Shows. Each party shall bear its own costs on appeal.

REVERSED AND REMANDED

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY JANE WILSON, Plaintiff-Appellee, v. THOMAS DAVID MARCHINGTON; INLAND EMPIRE SHOWS, INC., Defendants-Appellants,	No. 96-35145 D.C. No. CV-92-001270-PGH ORDER (Filed Nov. 19, 1997)

Before: WRIGHT, REINHARDT, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

25 U.S.C.A. § 323. Rights-of-Way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

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25 U.S.C.A. § 324. Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478 and 479 of this title; sections 473a and 496 of this title; and subchapter VIII of chapter 14 of this title, shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest

therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

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25 U.S.C.A. § 325. Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

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25 U.S.C.A. § 326. Laws unaffected

Sections 323 to 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838) [16

U.S.C.A. § 791a et seq.], nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.

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25 U.S.C.A. § 327. Application for grant by department or agency

Rights-of-way for the use of the United States may be granted under sections 323 to 328 of this title upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

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25 U.S.C.A. § 328. Rules and regulations

The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title.

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25 U.S.C.A. § 1321. Assumption by State of criminal jurisdiction

(a) Consent of United States; force and effect of criminal laws

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses

committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

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25 U.S.C.A. § 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or

shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

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25 U.S.C.A. § 1323. Retrocession of jurisdiction by State

(a) Acceptance by United States

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions

Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

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25 U.S.C.A. § 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

---

25 U.S.C.A. § 1325. Abatement of actions

(a) Pending actions or proceedings; effect of cession

No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) Criminal actions; effect of cession

No cession made by the United States under this subchapter shall deprive any court of the United States of

jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

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25 U.S.C.A. § 1326. Special election

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a Special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

APPENDIX D

11 Stat 657
(Cite as: 1855 WL 5599 (Trty.))

The Office of the President of the United States

(TREATY)

TREATY WITH THE BLACKFEET, 1855.

October 17, 1855.

Articles of agreement and convention made and concluded at the council-ground on the Upper Missouri, near the mouth of the Judith River, in the Territory of Nebraska, this seventeenth day of October, in the year one thousand eight hundred and fifty-five, by and between A. Cumming and Isaac I. Stevens, commissioners duly appointed and authorized, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the following nations and tribes of Indians, who occupy, for the purposes of hunting, the territory on the Upper Missouri and Yellowstone Rivers, and who have permanent homes as follows: East of the Rocky Mountains, the Blackfoot Nation, consisting of the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians. West of the Rocky Mountains, the Flathead Nation, consisting of the Flathead, Upper Pend d'Oreille, and Kootenay tribes of Indians, and the Nez Perce tribe of Indians, the said chiefs, headmen and delegates, in behalf of and acting for said nations and tribes, and being duly authorized thereto by them.[1], [2]

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[1] Ratified Apr. 15, 1856.

[2] Proclaimed Apr. 25, 1856.

ARTICLE 1

Peace, friendship and amity shall hereafter exist between the United States and the aforesaid nations and tribes of Indians, parties to this treaty, and the same shall be perpetual.[3]

ARTICLE 2

The aforesaid nations and tribes of Indians, parties to this treaty, do hereby jointly and severally covenant that peaceful relations shall likewise be maintained among themselves in future; and that they will abstain from all hostilities whatsoever against each other, and cultivate mutual good-will and friendship. And the nations and tribes aforesaid do furthermore jointly and severally convenant, that peaceful relations shall be maintained with and that they will abstain from all hostilities whatsoever, excepting in self-defense, against the following-named nations and tribes of Indians, to wit: the Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arcs, and Auncepapas bands of Sioux, and all other neighboring nations and tribes of Indians.[4]

ARTICLE 3

The Blackfoot Nation consent and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory, lying within lines

---

[3] Peace to exist with the United States.

[4] Peace to exist with each other and with certain other tribes.

drawn from the Hell Gate or Medicine Rock Passes in the main range of the Rocky Mountains, in an easterly direction to the nearest source of the Muscle Shell River, thence to the mouth of Twenty-five Yard Creek, thence up the Yellowstone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction, to the point of beginning, shall be a common hunting-ground for ninety-nine years, where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting-ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof.[5]

Provided, That the western Indians, parties to this treaty, may hunt on the trail leading down the Muscle Shell to the Yellowstone; the Muscle Shell River being the boundary separating the Blackfoot from the Crow territory.

And provided, That no nation, band, or tribe of Indians, parties to this treaty, nor any other Indians, shall be permitted to establish permanent settlements, or in

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[5] Blackfoot territory recognized as common hunting ground.

any other way exercise, during the period above mentioned, exclusive rights or privileges within the limits of the above-described hunting-ground.[6]

And provided further, That the rights of the western Indians to a whole or a part of the common hunting-ground, derived from occupancy and possession, shall not be affected by this article, except so far as said rights may be determined by the treaty of Laramie.[7]

ARTICLE 4

The parties to this treaty agree and consent, that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell River, thence down said river to its mouth, thence down the channel of the Missouri River to the mouth of Milk River, thence due north to the forty-ninth parallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning, shall be the territory of the Blackfoot Nation, over which said nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty. Subject, however, to the provisions of the third article of this treaty, giving the right to hunt, and prohibiting the establishment of permanent villages and the exercise of any exclusive rights within ten miles of the northern line of the common hunting-ground, drawn from the nearest

---

[6] No settlements to be made thereon.

[7] Vested rights not affected.

source of the Muscle Shell River to the Medicine Rock Passes, for the period of ninety-nine years.[8]

Provided also, That the Assiniboins shall have the right of hunting, in common with the Blackfeet, in the country lying between the aforesaid eastern boundary line, running from the mouth of Milk River to the forty-ninth parallel, and a line drawn from the left bank of the Missouri River, opposite the Round Butte north, to the forty-ninth parallel.

ARTICLE 5

The parties to this treaty, residing west of the main range of the Rocky Mountains, agree and consent that they will not enter the common hunting ground, nor any part of the Blackfoot territory, or return home, by any pass in the main range of the Rocky Mountains to the north of the Hell Gate or Medicine Rock Passes. And they further agree that they will not hunt or otherwise disturb the game, when visiting the Blackfoot territory for trade or social intercourse.[9]

ARTICLE 6

The aforesaid nations and tribes of Indians, parties to this treaty, agree and consent to remain within their own respective countries, except when going to or from, or whilst hunting upon, the "common hunting ground," or

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[8] Certain territory to belong to the Blackfoot Nation.

[9] How to enter and leave the common hunting ground.

when visiting each other for the purpose of trade or social intercourse.[10]

ARTICLE 7

The aforesaid nations and tribes of Indians agree that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them. And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.[11], [12]

ARTICLE 8

For the purpose of establishing travelling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree, that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description; establish lines of telegraph and military posts; use materials of every description found in the Indian country; build houses for agencies, missions, schools, farms, shops, mills, stations, and for any other purpose for which they may be required, and permanently occupy as much land as may be necessary for the

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[10] Indians to remain in their respective territories except, etc.

[11] Citizens may pass through and live in the Indian Territory.

[12] Protection against depredations.

various purposes above enumerated, including the use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States.[13]

ARTICLE 9

In consideration of the foregoing agreements, stipulations, and cessions, and on condition of their faithful observance, the[14] United States agree to expend, annually, for the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians, constituting the Blackfoot Nation, in addition to the goods and provisions distributed at the time of signing the treaty, twenty thousand dollars, annually, for ten years, to be expended in such useful goods and provisions, and other articles, as the President, at his discretion, may from time to time determine; and the superintendent, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto: Provided, however, That if, in the judgment of the President and Senate, this amount be deemed insufficient, it may be increased not to exceed the sum of thirty-five thousand dollars per year.

ARTICLE 10

The United States further agree to expend annually, for the benefit of the aforesaid tribes of the Blackfoot Nation, a sum not exceeding fifteen thousand dollars

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[13] Roads, telegraph lines, and military posts, etc., may be established.

[14] Annual payment for benefit of Blackfoot Nation.

annually, for ten years, in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and Christianization: Provided, however, That to accomplish the objects of this article, the President may, at his discretion, apply any or all the annuities provided for in this treaty: And provided, also, That the President may, at his discretion, determine in what proportions the said annuities shall be divided among the several tribes.[15]

ARTICLE 11

The aforesaid tribes acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and to commit no depredations or other violence upon such citizens. And should any one or more violate this pledge, and the fact be proved to the satisfaction of the President, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. The aforesaid tribes are hereby bound to deliver such offenders to the proper authorities for trial and punishment, and are held responsible, in their tribal capacity, to make reparation for depredations so committed.[16]

Nor will they make war upon any other tribes, except in self-defense, but will submit all matter of difference,

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[15] Same object.

[16] Provisions to secure peace, and indemnity against Indian depredations.

between themselves and other Indians, to the Government of the United States, through its agents, for adjustment, and will abide thereby. And if any of the said Indians, parties to this treaty, commit depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.[17], [18], [19]

ARTICLE 12

It is agreed and understood, by and between the parties to this treaty, that if any nation or tribe of Indians aforesaid, shall violate any of the agreements, obligations, or stipulations, herein contained, the United States may withhold, for such length of time as the President and Congress may determine, any portion or all of the annuities agreed to be paid to said nation or tribe under the ninth and tenth articles of this treaty.[20]

ARTICLE 13

The nations and tribes of Indians, parties to this treaty, desire to exclude from their country the use of ardent spirits or other intoxicating liquor, and to prevent

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[17] War not to be made on other tribes except in self-defense.

[18] Provision against depredations of other Indians.

[19] Criminals to be surrendered.

[20] Annuities may be stopped in case of violation of this treaty.

their people from drinking the same. Therefore it is provided, that any Indian belonging to said tribes who is guilty of bringing such liquor into the Indian country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.[21]

ARTICLE 14

The aforesaid nations and tribes of Indians, west of the Rocky Mountains, parties to this treaty, do agree, in consideration of[22] the provisions already made for them in existing treaties, to accept the guarantees of the peaceful occupation of their hunting-grounds, east of the Rocky Mountains, and of remuneration for depredations made by the other tribes, pledged to be secured to them in this treaty out of the annuities of said tribes, in full compensation for the concessions which they, in common with the said tribes, have made in this treaty.

The Indians east of the mountains, parties to this treaty, likewise recognize and accept the guarantees of this treaty, in full compensation for the injuries or depredations which have been, or may be committed by the aforesaid tribes, west of the Rocky Mountains.

---

[21] Provision against intoxication or the introduction of ardent spirits.

[22] This treaty to be in full for compensation.

ARTICLE 15

The annuities of the aforesaid tribes shall not be taken to pay the debts of individuals.[23]

ARTICLE 16

This treaty shall be obligatory upon the aforesaid nations and tribes of Indians, parties hereto, from the date hereof, and upon the United States as soon as the same shall be ratified by the President and Senate.

In testimony whereof the said A. Cumming and Isaac I. Stevens, commissioners on the part of the United States, and the undersigned chiefs, headmen, and delegates of the aforesaid nations and tribes of Indians, parties to this treaty, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

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[23] Annuities not to be taken for debt.

(2)

Supreme Court, U.S.
FILED
MAR 19 1998
CLERK

No. 97-1348

In The

Supreme Court of the United States

October Term, 1997

MARY JANE WILSON,

Petitioner,

v.

THOMAS DAVID MARCHINGTON;
INLAND EMPIRE SHOWS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

WILLIAM O. BRONSON
Counsel of Record
JAMES, GRAY, BRONSON & SWANBERG, P.C.
Wendt Building
615 Second Avenue North
P.O. Box 2885
Great Falls, MT 59403
Telephone: (406) 454-5709
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

(1) Should a writ of certiorari issue where the Court of Appeals below construed federal statutes consistent with prior rulings by this Court?

(2) Should a writ of certiorari issue where the Court of Appeals applied a recent ruling by this Court to a virtually identical set of facts in dispute?

(3) Should a writ of certiorari issue where the petitioner is requesting this Court to resolve factual disputes already decided by the federal and tribal courts below?

(4) Should a writ of certiorari issue where the decision of the Court of Appeals below is consistent with prior decisions of this Court, other Courts of Appeal, and the high court of at least one state, as well as its own precedent?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, entered September 23, 1997, is reported at 127 F.3d 805 (9th Cir. 1997), and can be found in the Appendix to Petitioner's Brief, pp. App. 1 through App. 25 [hereinafter Petitioner's App., at ___.]

JURISDICTION

Respondents agree with the jurisdictional statements set forth on page 1 of the Petitioner's brief.

STATUTES INVOLVED

The statutes listed below can be found in the appendix to Respondents' brief:

25 U.S.C. § 311

38 Stat. 1188

Any other statutes referenced herein are included in the Petitioner's Appendix.

STATEMENT OF THE CASE

Respondents take exception to certain portions of Petitioner's statement of the case as set forth on pages 2 and 3 of her petition, as follows:

At page 3, Petitioner alleges that Respondent Marchington "crossed a double yellow line attempting to

pass [Wilson], causing a collision which resulted in significant injuries to [her.]" The question of whether Respondent Marchington actually crossed a double yellow line, thereby implying that he violated some law, is disputed. Respondents also dispute whether Petitioner actually suffered "significant injuries" as a result of the aforementioned accident.

Other than this exception, the statement of the case as set forth is essentially correct. Any factual disputes between the parties are inconsequential to the resolution of Petitioner's request for certiorari.

Petitioner's description of proceedings in the tribal courts and in the federal district and appellate courts is set forth accurately.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of this Court provides in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling or fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state

> court of last resort; or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power;
>
> . . . .
>
> c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

None of these prerequisites are satisfied by Petitioner. Her principal concern appears to be that the United States Court of Appeals has decided an important question of federal law in a manner conflicting with other rulings of this Court. This argument is without merit. Not only is the decision of the Court of Appeals below entirely consistent with previous rulings of this Court, but the decision in no way raises any issues of significant consequence that have not already been decided by this Court, or which compel any direct exercise of this Court's supervisory power.

A. The issue with respect to "alienation of land."

Petitioner's principal argument is that the Court of Appeals either based its decision on an erroneous construction of a specific treaty, or at least did not give the

Blackfeet Tribal Court the opportunity to make initial determinations as to the meaning and consequence of that treaty. Petitioner's Brief, at 5-10.

Petitioner's argument is without merit. It ignores the basis of the Court of Appeals' holding below. That holding is consistent not only with federal statute, but with prior opinions of this Court on related subjects. Petitioner's argument assumes that the decision of the Court of Appeals below was based almost exclusively on an interpretation of the Treaty of 1855 between the United States and the Blackfeet Nation. This argument misrepresents the holding of the Court of Appeals. The court's decision is based primarily not upon construction of a treaty, but on construction of a federal statute, in light of a comparable construction given of a comparable statute by this Court in *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S.Ct. 1404 (1997).

The Court of Appeals below was called upon to construe 25 U.S.C. § 311, under which the Secretary of the Interior is authorized:

> [t]o grant permission . . . to the proper state or local authorities for the opening or establishment of public highways in accordance with the laws of the state or territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under laws or treaties but which have not been conveyed to the allotees with full power of alienation.

See also Act of March 4, 1915, chapter 161, section 2, 38 Stat. 1188 ("that the legal authorities charged with the

duty of laying out and opening public roads and highways under the laws of the state of Montana, having jurisdiction over any territory embraced with any Indian reservation in Montana are hereby authorized and empowered to layout and open public roads within any of the said reservations . . . ").[1]

This Court has held that a road opened and established pursuant to 25 U.S.C. § 311 is governed by state law. See *United States v. Oklahoma Gas and Electric Company*, 318 U.S. 206, 63 S.Ct. 534 (1943). There, the United States brought a declaratory judgment action against the Oklahoma Gas and Electric Company on grounds that the company was illegally occupying certain Indian lands within its pole line. This Court held that the appropriate interpretation of 25 U.S.C. § 311 was that the scope of use to which a highway opened up under the Act could be put was to be determined by state law in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary. 318 U.S. at 209, 63 S.Ct. at 535. State law controls not because of the power of the state, but because of the Congressional adoption of state law as the measure of the federal grant. "These considerations, as well as the explicit reference in the act of state law in the matter of 'establishment' as well as of 'opening' the highway, indicate that the question in this case is to be answered by reference to that law . . . " 318 U.S. at 210, 63 S.Ct. at 536.

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[1] The Court of Appeals discussion can be found at 127 F.3d at 813-815; see also Petitioner's App. at 19-22.

In accordance with that holding, where the state of Oklahoma had been given permission to establish a highway, the state, acting pursuant to state law, was authorized to grant an electric company a license permitting the company to occupy a portion of the highway across the allotted lands with a rural electric service line. The United States, acting in its role as trustee for the Indian lands, could not restrict that access.

This Court's holding has formed the basis of decisions within Montana with respect to the scope of such an easement, and the power of tribes to interfere with that easement. In *United States v. Mountain States Telephone and Telegraph Company*, 434 F.Supp. 625 (D.Mont.1977), then-Chief United States District Judge Russell Smith held that this Court's decision in *Oklahoma Gas* formed a sufficient basis under which the law of Montana controlled the right of a telephone company to establish a buried telephone line cable on the right-of-way of a United States Highway crossing the Flathead Indian Reservation, without the approval of the Secretary of the Interior or the Tribal Government. 434 F.Supp. 626-628.

The Court of Appeal's decision below with reference to these federal statutes tracks this Court's analysis of comparable statutes in *Strate*. In *Strate*, this Court held that the state of North Dakota acquired a right-of-way for a state highway in accordance with 25 U.S.C. §§ 323-328[2], statutes comparable to 25 U.S.C. § 311. See *Strate*, 117 S.Ct. at 1413-1414. With one exception, the right-of-way

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[2] The text of 25 U.S.C. §§ 323-328 is set forth in Petitioner's Appendix at App. 27 through 29.

acquired by North Dakota essentially rendered that stretch of highway alienated non-Indian land; the tribe involved in that case did not reserve any right to exercise dominion or control over the right-of-way. 117 S.Ct. at 1414. Consequently, in accordance with the rule announced in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (1981), this Court held that when an automobile accident occurred on a portion of the public highway maintained over that right-of-way, tribal courts could not entertain a civil action against an allegedly negligent driver or the driver's employer, neither of whom was a member of the tribe. *Strate*, 117 S.Ct. at 1414-1416.

As with the right-of-way involved in *Strate*, U.S. Highway 2 – the highway involved in the instant case – was found by the Court of Appeals below to be "similar in all relevant respects to the highway in Strate." 127 F.3d at 813; Petitioner's App. at 19. The road is located on an easement granted to the state under 25 U.S.C. § 311. As a highway constructed under a right-of-way granted under a federal statute, the factual scenario is to that extent identical to that involved in *Strate*.

The Court of Appeals' reference to the Blackfeet Indian Treaty was secondary to its conclusion that the right-of-way over which U.S. Highway 2 was constructed was properly conferred, and that the Blackfeet Tribe could not restrict access over that highway. 127 F.3d at 814; Petitioner's App. at 20-21. The language of the treaty is plain to the effect that the tribe long ago consented to the construction of public roads through tribal lands. Whether (1) consistent with the consent, or (2) consistent with Congress' plenary powers in such matters, the State

of Montana received a right-of-way over which U.S. Highway 2 was constructed, and that right-of-way is no different than the one discussed in *Strate* as having been granted to the State of North Dakota.

Petitioner's arguments with respect to the treaty do not outweigh considerations imposed either by federal statute or prior rulings of this Court. The obvious implication behind Petitioner's argument is that if her interpretation of the treaty is correct, then the Blackfeet Tribe would have a right to restrict access over U.S. Highway 2. But at no time has the Blackfeet Tribe ever attempted to assert such control. Indeed, in the proceedings below, not even Petitioner's counsel asserted that the Tribe somehow had rights to restrict rights over U.S. Highway 2. 127 F.3d at 814; Petitioner's App. at 21. Any suggestion now by Petitioner to the contrary would constitute an attempt to introduce new or changed arguments and evidence on matters that have already been concluded both by the Court of Appeals and the District Court below.

The decision of the Court of Appeals below is consistent with the long-established rule of this Court that Indian title is only a "right of occupancy . . . extinguishable only by the United States." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 777 (1974). At least one federal district court within the Ninth Circuit has held that rights-of-way established for United States highways are "just such a clear expression of Congressional intent to extinguish Indian title in rights-of-way . . . " *Swift Transportation, Inc. v. John*, 546 F.Supp. 1185, 1192 (D. Ariz. 1982) (right-of-way for U.S. Highway 89 established pursuant to 25 U.S.C. §§ 323-328; where

statutory prerequisites for right-of-way satisfied, the status of the highway is equivalent to that of non-Indian fee land, as concluded in *Montana v. United States*).

The statute authorizing the opening of lands which eventually became U.S. Highway 2 do not carry with them rights of compensation or consent requirements; these prerequisites are usually found in more recent federal legislation setting forth the requirements for obtaining rights-of-way. Nevertheless, the absence of such provisions does not change the basic principle that Congressional action can operate to extinguish Indian title, and that in any event, the Blackfeet Tribe in fact gave its consent in 1855.

In summary, Petitioner's argument with respect to "alienation of land" is without merit. The holding of the United States Court of Appeals below is entirely consistent with previous decisions of this Court and the mandates of federal statute.

B. The status of the Plaintiff in this action is irrelevant.

Petitioner's second basis for seeking certiorari is the assertion that where a tribal member plaintiff is involved, as in the instant case, the considerations set forth in *Strate* do not apply. Petitioner's Brief, at 10-12. Petitioner misreads this Court's holding.

Strate involved a claim by a non-Indian plaintiff against a non-Indian defendant. Yet this fact is of no consequence to this Court's jurisdictional analysis; *Strate* is very clear that the status of the *plaintiff* is irrelevant in

deciding whether the *tribal court* has jurisdiction in civil proceedings; rather, it is the status of the *defendant* vis-a-vis the tribe's authority that is critical:

> This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members. Specifically, we confront this question: When an accident occurs on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?
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> 117 S.Ct. at 1406.

At no point in *Strate* does this Court ever state, suggest or imply that the holding turns on the status of the plaintiff. If that were true, then the Court's decision would make no sense. As *Strate* makes clear, the starting point for jurisdictional analysis is this Court's prior ruling in *Montana v. United States*. According to that decision, civil jurisdiction of a tribal entity does not extend to the activities of non-members of the tribe, absent a grant of such authority by Congress. The only exceptions to that rule are that a tribe retains authority to regulate the activities of nonmembers who enter consensual relationships with the tribe or its members (commonly referred to as the first *Montana* exception); and a tribe may also have authority over the conduct of non-Indians when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," the so-called second *Montana* exception. See *Montana*, 450 U.S. at 565-566, 101 S.Ct. at 1258-1259,

cited in Strate, 117 S.Ct. at 1409. The *Montana* analysis is not driven by the status of the plaintiff or complainant in civil proceedings.

Here, as before the Court of Appeals below, Petitioner took the position that *Strate* either did not apply due to Petitioner's status as a tribal member, or if it did, the second *Montana* exception applied in such a way as to confer jurisdiction in the tribal court. But the Court of Appeals below rejected such an argument, citing *this* Court's own statements in *Strate:*

> Wilson . . . claim[s] that a traffic accident injuring a tribal member sufficiently affects the economic security, political integrity, or health and welfare of the tribe, thus satisfying the second Montana exception. However, in Strate, this notion was rejected by Justice Ginzberg, speaking for the Court, who observed that:
>
> > Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule.
>
> [*Strate*, 117 S.Ct. at 1415]. If the possibility of injuring multiple tribal members does not satisfy the second Montana exception, then, perforce, Wilson's status as a tribal member alone cannot.
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> 127 F.3d at 814-815; Petitioner's App. at 22-23.

This is the only holding consistent with both *Montana* and *Strate*. Petitioner's claims to the contrary are without merit.[3]

C. "Value of a remand to the Tribal Court."

Petitioner also suggests that certiorari is important, because the "Tribal Court has not had the opportunity to consider the jurisdictional issues raised by this Court in *Strate*." Petitioner's Brief, at 12.

This argument is simply a means by which Petitioner proposes to re-litigate factual issues already resolved by the tribal or federal courts below. Petitioner alleges that there really was no right-of-way along U.S. Highway 2, or at least, there was no proceeding to determine the existence of the right-of-way. This argument is without merit. Not only is the fact of the right-of-way clearly established, but Petitioner failed to even argue this point on the initial appeal. Moreover, the determination of the existence of a right-of-way is a question of law, and since

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[3] Petitioner cites this Court to a contrary interpretation rendered by United States District Judge Don Molloy, see Petitioner's Brief, at 11-12 [citing decision in *State of Montana v. Bremner*, Opinion and Order, CV 97-59-GF-DWM (D. Mont. July 31, 1997), now reported at 971 F.Supp. 436]. This decision, handed down nearly two months before the decision of the Court of Appeals below, is inconsistent with the opinion of the Court of Appeals, and is therefore of no force and effect. Furthermore, Judge Molloy's views are not persuasive, as they are entirely inconsistent with *Montana v. United States*, as construed by this Court in *Strate*. Judge Molloy's analysis makes the same fatal assumptions argued by Petitioner in her brief.

the questions ultimately raised in this case are the interpretations of federal statutes, the value of a remand to Tribal Court is irrelevant.

Likewise, evidentiary disputes as to the "point of collision" were also resolved in the federal district court below, as noted by the Court of Appeals:

> The question of whether the accident occurred on, or just off, Highway 2, is disputed by the parties. The district court, however, determined that the accident occurred on Highway 2, and we review this finding only for clear error. [citation omitted] There are facts in the record which support the district court's conclusion. The accident occurred while Marchington was trying to pass Wilson. . . . Wilson argues the impact may have occurred just off Highway 2 because [Marchington] was trying to avoid Wilson by driving on the left. However, both parties agreed that the State of Montana's right-of-way did not end at the pavement and could have extended up to fifty feet from the center line. . . . [T]he description of the accident by the Blackfeet Supreme Court would seem to support the inference that the accident occurred on Highway 2. [footnote citation omitted] Given these facts, there was no clear error in the district court's determination.
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> 127 F.3d at 814; Petitioner's App. at 21-22.

Certiorari is clearly inappropriate. Rule 10, Sup. Ct. R.

D. Other considerations

In a footnote to the concluding section of her brief, Petitioner cites this Court to numerous cases, asserting

that the Court of Appeals decision below is contrary to all or most of these decisions. Petitioner's Brief, at 15 n.1. The proposition is stated only as a conclusion, without any attempt to explain the reasons why the decision of the Court of Appeals is inconsistent with prior case law. Respondents therefore are reluctant to address Petitioner's conclusory argument in any detail. However, there is an incidental benefit to reviewing the prior case law, because such a review actually serves to support Respondents' position that the decision of the Court of Appeals below is not out of keeping with the language and tenor of those decisions.

Two of the cases cited in the footnote, *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) and *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985), are decisions of this Court. The holdings in these cases are not inconsistent with the holding of the Court of Appeals below. As noted by this Court in *Strate*:

> National Farmers Union and Iowa Mutual enunciate only an exhaustion requirement, a 'prudential rule,' see Iowa Mutual, 480 U.S., at 20, n.14, 107 S.Ct. at 978, n.14, based on comity, see id., at 16, n.8, 107 S.Ct., at 976, n.8. These decisions do not expand or stand apart from Montana [v. United States] instruction on the 'inherent sovereign powers of an Indian tribe.' 450 U.S. at 565, 101 S.Ct. at 1258.
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> 117 S.Ct. at 1413.

Thus, any assertion by Petitioner that these decisions actually confer jurisdiction upon tribal courts is directly contrary to the holding of this Court. Likewise, any and

all decisions by the Court of Appeals below which Petitioner believes confer jurisdiction on tribal courts do not so hold to the extent these decisions were decided in the wake of *National Farmers Union*, *Iowa Mutual*, or both, and merely reiterate this Court's determination that parties should first exhaust all their remedies in tribal courts before bringing request for relief to the federal courts.[4]

The balance of the decisions cited by Petitioner in her footnote fall into one of three additional categories, none of which have any bearing on the instant case: (1) disputes involving non-Indians who arguably entered into consensual commercial relationships with tribes or tribal members, thus potentially bringing the non-Indians within the first exception to the *Montana* rule, and thereby suggesting that tribal courts indeed had jurisdiction[5]; (2) disputes involving non-Indians where their

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[4] Decisions cited by Petitioner which merely recite the "exhaustion requirement" are as follows: *Crawford v. Genuine Parts*, 947 F.2d 1405 (9th Cir. 1991); *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221 (9th Cir. 1987); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987); and *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1986).

[5] Decisions cited by Petitioner involving the prospect of tribal jurisdiction due to the existence of consensual commercial relationships are as follows: *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901 (1994) (enforcement of tribal gambling regulations); *White Mountain Apache Tribe v. Smith Plumbing Company, Inc.*, 856 F.2d 1301 (9th Cir. 1988) (injunction against subcontractor trying to enforce performance bond); and *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979 (1983) (dispute involving construction contract with tribal housing authority).

activities bear directly on the "political integrity, the economic security, or the health and welfare of the tribe", the second *Montana* exception[6]; or (3) unique factual and/or legal scenarios vastly different than those involved in the instant case, such that the considerations involved in these cases case do not even arise in, or are irrelevant to, the instant appeal.[7]

The decision of the Court of Appeals below is both consistent with its prior holdings as well as the holdings of this Court. Nothing stated in the decision below constitutes a departure from the essential principles governing tribal court jurisdiction.[8] To the extent that Petitioner

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[6] The case cited by Petitioner in that regard is *Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (dispute involving enforcement of tribal regulations on repossession of property; discussion of unique tribal interests affected by failure to allow tribal courts to enforce such regulations).

[7] In *United States v. Plain Bull*, 957 F.2d 724 (9th Cir. 1992), the Court of Appeals affirmed a district court decision dismissing an action brought by the United States against a tribal member to recover penalties for grazing cattle on tribal lands without a permit on grounds of comity; the Court of Appeals held that the federal courts should decline to exercise jurisdiction over transactions involving tribal members within the boundaries of their reservation. 975 F.2d at 725-727. In *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), the Court of Appeals affirmed a district court decision holding that a tribal court had properly exercised jurisdiction over a non-Indian husband in a tribal court divorce proceeding, where the Court of Appeals agreed that jurisdiction in this divorce proceeding was concurrent between the tribe and the nearby state district court. 864 F.2d at 632-633.

[8] Petitioner also implies that the Court of Appeals below erred in overruling a prior decision by that Court, *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994). It is the prerogative of a

argues any inconsistency between the Court of Appeals' holding and that of other courts, it should be emphasized that the holding is consistent with the only other known decisions involving similar facts. See *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1997); *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, ___U.S. ___, 117 S.Ct. 1404 (1997); *Red Fox v. Hettich*, 494 N.W.2d 638 (S. Dak. 1994).

CONCLUSION

For all the reasons set forth above, a Writ of Certiorari is unnecessary in this case. The decision of the Court of Appeals below is consistent with this Court's holding in *Strate*. It is also consistent with federal statutes respecting alienation and rights-of-way over Indian land, and decisions by this Court construing those statutes. The decision of the Court of Appeals below was simply an application of unquestioned precedent to a fact scenario virtually identical to that involved in *Strate*. Furthermore, the decision is consistent with the holdings of other circuit courts or the highest court of a state adjudicating comparable disputes. Respondents therefore respectfully

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Court of Appeals to overrule its prior decisions if compelled to do so by a subsequent and contrary decision by this Court, or by such changes in circumstances as the majority of the Court of Appeals deems sufficient to justify a reversal of its previous holding. Here, the Court of Appeals concluded that this Court's decision in *Strate* "effectively overruled [*Hinshaw*] . . . for its general propositions concerning tribal jurisdiction and is no longer viable law on those issues." 127 F.3d at 815; Petitioner's App. at 24.

request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM O. BRONSON
Counsel of Record
JAMES, GRAY, BRONSON & SWANBERG, P.C.
Wendt Building
615 Second Avenue North
P.O. Box 2885
Great Falls, MT 59403
Telephone: (406) 454-5709
Attorneys for Respondents

APPENDIX

25 U.S.C.A. § 311. Opening Highways

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening or establishment of public highways in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under laws or treaties but which have not been conveyed to the allottee with full power of alienation.

* * *

Act of March 4, 1915, ch. 161, § 2, 38 Stat. 1188

That the legal authorities charged with the duty of laying out and opening public roads and highways under the laws of the state of Montana, having jurisdiction over any territory embraced with any Indian reservation in Montana, are hereby authorized and empowered to lay out and open public roads within any of the said Indian reservations in conformity to and in accordance with the laws of the State of Montana relating to the laying out and opening of public roads, and that any public road when so laid out and opened shall be deemed a legal road: *Provided*, that such road authorities shall, in addition to notifying the landowners as provided in the State laws, likewise serve notice upon the superintendent in charge of the restricted Indian lands upon which it is proposed to lay out a public road, and shall also furnish

him with a map drawn on tracing linen showing the definite location and width of such proposed road, and no such road shall be laid out until after it has received the approval of such superintendent.